Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-5416

RUBY JONES,

Petitioner,

v.

DOUGLAS HILDEBRANT, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF COLORADO

BRIEF FOR THE PETITIONER

WALTER L. GERASH
DAVID K. REES
Suite 2317, 1700 Broadway
Denver, CO 80290

Counsel for Petitioner

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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OPINION BELOW

The opinion of the Supreme Court of Colorado (No. 26828) is reported at 550 P.2d 339.

JURISDICTION

The opinion of the Colorado Supreme Court was entered on May 24, 1976 (A. 43). A timely petition for

rehearing was filed, and was denied by the Colorado Supreme Court on June 21, 1976 (A. 52). A timely petition for Writ of Certiorari was granted on January 17, 1977. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

Where the black mother of a 15-year-old child, who was intentionally shot and killed by a white policeman acting under color of state law, brings a suit in state court pursuant to 42 U.S.C. §1983, what is the measure of damages? Particularly, can the state measure of damages cancel and displace an action brought pursuant to 42 U.S.C. §1983?

Constitutional and Statutory Provisions Involved

U.S. Const., Article VI, Section (2), provides:

This constitution, and the laws of the United States which shall be made in pursuance thereof # . . . # shall be the supreme law of the land; and the judges of every state shall be bound thereby; anything in the constitutions or laws of any state notwithstanding.

U.S. Const., Amend. XIV, provides in part:

* * * nor shall any state deprive any person of life, liberty, or property without due process of law * * *

42 U.S.C. §1983, states:

Civil action for deprivation of rights
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the

deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress. (R.S. §1979).

42 U.S.C. §1988, states:

Proceedings in vindication of civil rights
The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. (R.S. §722).

Colo. Rev. Stat. Ann. (1973).

"*13-20-101. What actions survive.* (1) All causes of action, except actions for slander or libel, shall survive and may be brought or continued notwithstanding the death of the person in favor of or against whom such action has accrued, but punitive damages shall not be awarded nor penalties adjudged after the death of the person against whom such punitive damages or penalties

are claimed; and in tort actions based upon personal injury, the damages recoverable after the death of the person on whose favor such action has accrued shall be limited to loss of earnings and expenses sustained or incurred prior to death, and shall not include damages for pain, suffering, or disfigurement, nor prospective profits or earnings after date of death. An action under this section shall not preclude an action for wrongful death under part 2 of article 21 of this title.

(2) Any action under this section may be brought, or the court on motion may allow, the action to be continued by or against the personal representative of the deceased. Such action shall be deemed a continuing one, and to have accrued to or against such representative at the time it would have accrued to or against the deceased, if he had survived. If such action is continued against the personal representative of the deceased, a notice shall be served on him as in cases of original process, but no judgment shall be collectible against a deceased person's estate or personal representative unless a claim shall have been filed within the time and in the manner required for other claims against an estate."

* * *

"*13-21-201. Damages for death.* (1) When any person dies from any injury resulting from or occasioned by the negligence, unskillfulness, or criminal intent of any officer, agent, servant, or employee while running, conducting, or managing any locomotive, car, or train of cars, or of any driver of any coach or other conveyance operated for the purpose of carrying either freight or passengers for hire while in charge of the same as a driver, and when any passenger dies from an injury resulting from or occasioned by any defect or insufficiency in any railroad or any part thereof, or in any locomotive or car, or other conveyance

operated for the purpose of carrying either freight or passengers for hire, the corporation or individuals in whose employe any such officer, agent, servant, employee, master, pilot, engineer, or driver is at the time such injury is committed, or who owns any such railroad, locomotive, car, or other conveyance operated for the purpose of carrying either freight or passengers for hire at the time any such injury is received, and resulting from or occasioned by the defect or insufficiency above described shall forfeit and pay exceeding ten thousand dollars and not less than three thousand dollars, which may be sued for and recovered:

(a) By the husband or wife of deceased; or

(b) If there is no husband or wife, or he or she fails to sue within one year after such death, then by the heir or heirs of the deceased; or

(c) If the deceased is a minor or unmarried, then by the father or mother who may join in the suit, and each shall have an equal interest in the judgment; or if either of them is dead, then by the survivor.

(2) In suits instituted under this section, it is competent for the defendant for his defense to show that the defect or insufficiency named in this section was not a negligent defect or insufficiency. If the action under this section is brought by the husband or wife of the deceased, the judgment obtained in said action shall be owned by such persons as are heirs at law of the deceased under the statutes of descent and distribution, and shall be divided among such heirs at law in the same manner as real estate is divided according to said statute of descent and distribution."

* * *

"*13-21-202. Action notwithstanding death.* When the death of a person is caused by a wrongful act, neglect, or default of another, and the act, neglect, or default is such as would, if

death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who or the corporation which would have been liable, if death had not ensued, shall be liable in an action for damages notwithstanding the death of the party injured."

* * *

"*13-21-203. Limitation on damages.* (1) All damages accruing under section 13-21-202 shall be sued for and recovered by the same parties and in the same manner as provided in section 13-21-201, and in every such action the jury may give such damages as they may deem fair and just, with reference to the necessary injury resulting from such death, to the surviving parties who may be entitled to sue; and also having regard to the mitigating or aggravating circumstances attending any such wrongful act, neglect, or default; except that if the decedent left neither a widow, widower, nor minor children, nor a dependent father or mother, the damages recoverable in any such action shall not exceed forty-five thousand dollars. No action shall be brought and no recovery shall be had under both section 13-21-201 and section 13-21-202 and in all cases the plaintiff is required to elect under which section he will proceed.

(2) This section shall apply to a cause of action based on a wrongful act, neglect, or default occurring on or after July 1, 1969. A cause of action based on a wrongful act, neglect, or default occurring prior to July 1, 1969, shall be governed by the law in force and effect at the time of such wrongful act, neglect, or default."

STATEMENT OF THE CASE

On October 15, 1973, the plaintiff, Ruby Jones, filed a Complaint in the District Court in and for the City and County of Denver against Douglas Hildebrant, Brian Moran,[1] and the City and County of Denver (hereinafter "City"). She alleged that on February 5, 1972, Douglas Hildebrant (hereinafter "Hildebrant"), a Denver police officer, in uniform and on duty, while acting within the scope of his employment and under the color of state law, intentionally shot her 15-year-old son, Larry Jones, in the back of the head, causing him to die.

Plaintiff stated three causes of action: battery, negligence, and deprivation of civil rights (42 U.S.C. §1983).[2] She prayed for compensatory damages of $1,500,000 and exemplary damages of $500,000 (A. 3).

The defendants, Hildebrant and the City, filed an answer in which they admitted that Hildebrant was a Denver police officer acting within the scope of his employment and that on February 5, 1972, he shot Larry Jones. Nevertheless, the defendants alleged that this homicide was justified on the grounds of self defense and on the ground that Hildebrant was in pursuit of a fleeing felon (A. 5-7).

On February 13, 1974, the defendant filed a Motion for Reduction of Prayer of Complaint (A. 8) on the

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[1] Officer Moran was subsequently dismissed from the lawsuit upon plaintiff's motion. This was accomplished through the filing of an Amended Complaint.

[2] A Fourth Claim for Relief based on a conspiracy between Officer Moran and Officer Hildebrant was later dismissed when Officer Moran was dismissed from the lawsuit.

basis that under Colorado law, in a wrongful death action, the maximum amount recoverable was $45,000, *Colo. Rev. Stat. Ann.*, §13-21-203, (1973). Plaintiff admitted that this monetary limitation applied to the Colorado statutes, but asserted that the Colorado law could not restrict plaintiff's claim brought under 42 U.S.C. §1983. Nevertheless, the defendants' motion was granted.

On November 11, 1974, the trial began (R. 37). On November 14, 1974, at the close of the evidence, the defendants in chambers moved to strike plaintiff's claim for exemplary damages and further moved to strike plaintiff's claim brought under 42 U.S.C. §1983 on the grounds that it was "redundant and repetitive" with plaintiff's other causes of action (A. 25). This motion was granted (A. 31). The following day, the jury returned a verdict finding the issues for the plaintiff and awarding her damages in the sum of $1,500.

Plaintiff subsequently filed her Motion for New Trial (R. 87) and Notice of Appeal (R. 102), and appealed to the Colorado Supreme Court, which court affirmed the judgment of the trial court by a vote of 4-2, Chief Justice Pringle and Justice Groves dissenting.[3] (A. 51).

Plaintiff's Petition for Rehearing was denied (R. 271). Subsequently, this Court granted *certiorari* (A. 58).

[3] Justice Kelly did not participate.

SUMMARY OF THE ARGUMENT

In affirming the decision of the trial court, the Colorado Supreme Court held that the measure of damages in a §1983 action could be controlled by state law, where the violation of constitutional rights resulted in death. This argument ignored the purposes of the Civil Rights Acts. The legislative history clearly shows that the Acts were designed to provide federal control over state activities. In this way, the federal government became able to enforce federal rights against persons acting under color of state law.

This control manifested itself by providing a federal remedy to protect federal rights. This remedy was designed to be *supplementary* to any state remedy, and therefore, cannot be controlled by a state law of damages. This is true whether the action is brought in federal or state courts. This federal remedy, which is authorized by 42 U.S.C. §1988 and is now firmly embedded in the federal common law, may utilize state law where necessary, but may never do so to restrict the purposes of the statute. Rather, where state law is inconsistent with the Civil Rights Acts, the federal, not the state law controls.

The fact that Ruby Jones could use state law as a basis of standing is similarly irrelevant. State law may only be used to fill gaps in federal law. Since there is no gap in the federal common law of damages, state law is unavailable. Moreover, Ruby Jones had standing to bring the suit under the federal common law. Consequently, the state restrictions on damages cannot possibly restrict her federal remedy.

ARGUMENT

I.

THE CREATION OF THE RIGHT: THE CONGRESSIONAL INTENT INDICATES THAT §1983 WAS INTENDED TO CONTROL STATE ACTIVITY BY PROVIDING A FEDERAL REMEDY.

In its decision below, the Colorado Supreme Court held, *inter alia*, that the Colorado measure of damages is "engrafted" onto an action brought for deprivation of civil rights under 42 U.S.C. §1983, at least where the unconstitutional activity resulted in death. An analysis of the legislative history behind §1983 shows the flaws in this argument, for it is clear that §1983 was intended to control state activity. Moreover, this control was to be exercised by providing a federal remedy for the violation of federal rights.

After the Civil War and slavery ended in 1865, a wave of murder and assault against blacks and Union sympathizers occurred in the South. In response, President Grant sent a message to Congress asking for federal legislation to curb these acts of violence. Congress, in return, passed the Ku Klux Klan Act of 1871, 17 Stat. 13, Section 1, which is now codified as 42 U.S.C. §1983. *District of Columbia v. Carter*, 409 U.S. 718, 425-426 (1973). This act, along with the passage of the Fourteenth Amendment, made a major change in the nature of federal-state relations by giving the federal government added control over state activity. As a result of this post-Civil War legislation, "[T]he role of the Federal Government as a guarantor of basic federal rights against state power was clearly

established." *Mitchum v. Foster*, 407 U.S. 225 (1972).[4] One scholar has summarized this new exercise of federal power noting that, "[T]he constitutional rights and their implementing components establish a nationwide floor below which state experimentation will not be permitted to fall." Monaghan, *Constitutional Common Law*, 89 Harv.L.Rev. 1, at 19 (1975).

This federal control was multi-faceted. First, it provided a vehicle through which certain state laws and practices could be overridden. *Monroe v. Pape*, 365 U.S. 167, at 173 (1961). In this regard, it provided a federal forum to insure that those whose constitutional rights were being violated would have a vehicle to redress their grievance. *District of Columbia v. Carter, supra*, at 427.

Secondly, this control was exercised by providing federal remedies for the violation of federal rights. *Monroe v. Pape, supra*, at 173-174; *McNeese v. Board of Education*, 373 U.S. 668 (1963). Moreover, these remedies were intended to be *supplementary* to any state remedy. As Justice Douglas noted in *Monroe v. Pape, supra*, the Civil Rights Acts were passed, in part to provide a federal remedy where the state remedy is inadequate. Justice Harlan in his concurring opinion expanded on this point. He wrote:

> The statute becomes more than a jurisdictional provision only if one attributes to the enacting

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[4] Congressman Stoughton emphasized this federal control, stating:

> The authority thus confined [by the Fourteenth Amendment] is subject to no restrictions or limitations. It is for Congress to determine what legislation is appropriate, and its decision is binding upon every other department of the Government. [*Congressional Globe*, 42d Congress, p. 32].

> legislature the view that a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right. [*Id.* at 196].

Justice Harlan went on to point out that he favored this view as a "common-sense matter", because it was "more consistent with the flavor of the legislative history". *Ibid.*[5] Then in a footnote, he stated:

> There will be many cases in which the relief provided by the state to the victim of a use of state power . . . will be far less than what Congress may have thought would be a fair reimbursement for deprivation of a constitutional right. [*Ibid.*].

The vehicle through which these federal remedies were implemented is 42 U.S.C. §1988. Under §1988, both federal and state law may be used, if necessary, to

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[5] Justice Harlan noted that Civil Rights Act cases may be brought in federal court. While this is of course true, a plaintiff may under the theory of concurrent jurisdiction bring the case in state court. *Holland v. Perini*, 512 F.2d 93 (10th Cir., 1975), *cert. denied*, 423 U.S. 994; *Long v. District of Columbia*, 469 F.2d 927 (D.C. Cir., 1972); Cf. *Testa v. Katt*, 330 U.S. 386 (1947); *Grubb v. Public Utilities Commission*, 281 U.S. 470 (1930); *Robb v. Connally*, 111 U.S. 624 (1884); *Claflin v. Houseman*, 93 U.S. 130 (1876). In fact, prior to 1875, the federal courts had no general, federal-question jurisdiction. *Bunnon v. Board of Governors*, 413 F. Supp. 1274 (1976). The choice of a state forum to enforce federally protected constitutional rights is salutory. With the proliferation of Title VII cases and the press of other administrative matters in the federal courts, it is particularly beneficial to permit state courts to enforce federal rights, thus relieving the burden on the federal courts.

provide a plaintiff an adequate remedy. Yet this court has stated emphatically that although state sources may be used, the remedy is still federal.

In *Sullivan v. Little Hunting Park*, 396 U.S. 229, 240 (1969), this court stated:

> This means, as we read §1988, that both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statutes. Cf. *Brazier v. Cherry*, 293 F.2d 401. The rule of damages, whether drawn from federal or state sources, is a federal rule responsive to the need where a federal right is impaired.

Similarly, in *Basista v. Weir*, 340 F.2d 74 (3d Cir., 1965), the Third Circuit upheld the award of $1,500 exemplary damages to a plaintiff who had obtained a judgment pursuant to 42 U.S.C. §1983 as a result of being beaten and falsely arrested by the police. In discussing the measure of damages, the court held: "We are of the opinion, as we have stated, that the federal common law of damages commands the issue in the case at bar." *Id.* at 87. *Accord, Harrison v. United Transportation Union*, 530 F.2d 558, (4th Cir., 1975); *Martin v. Duffie*, 463 F.2d 464 (10th Cir., 1972); *Seaton v. Sky Realty Co.*, 491 F.2d 634, (7th Cir., 1974); *Gaston v. Gibson*, 328 F. Supp. 2 (E.D. Tenn., 1969). Obviously, as the Civil Rights Acts were intended to supplement state law, they cannot be restricted by the bounds of that law.

II.

THE FEDERAL REMEDY IS UNIFORM

The need to utilize federal common law in §1983 actions is evident since Congress intended the Civil Rights Acts to be applied uniformly in all state and federal forums. As the Court in *Basista v. Weir, supra,* held:

> We believe that the benefits of the Acts were intended to be uniform throughout the United States, that the protection to the individual to be afforded by them was not intended by Congress to differ from state to state and that the amount of damages to be recovered by the injured individual was not to vary because of the law of the state in which the federal court suit was brought. [*Id.* at 86].

The court then added "Federal common law must be applied to effect uniformity, otherwise the Civil Rights Acts would fail to effect the purposes and ends which Congress intended." *Ibid.*

The necessity for uniformity has been referred to in many cases. For example, in *Caperci v. Huntoon,* 397 F.2d 799 (1st Cir., 1968), *cert. denied,* 393 U.S. 940 (1968), the court permitted the plaintiff to obtain exemplary damages in a §1983 action even though Massachusetts did not provide such damages. The court stated, "[W]e believe, on balance, that the remedial purpose of the Act is better served by not permitting local variation allowing dimunition of the amount of recovery." *Id.* at 801. Similarly, in *Shaw v. Garrison,* 545 F.2d 980 (5th Cir., 1977), the Fifth Circuit Court of Appeals refused to dismiss a §1983 action even though under local law the action would have

terminated with the death of the plaintiff. Rather, the court in order to provide a uniform remedy, utilized federal common law and permitted the action to survive.

These cases clearly indicate that the federal common law affords the same remedy to all people whose constitutional rights have been violated. Federal constitutional rights as protected by the Civil Rights Acts should not be restricted by the vagaries and vicissitudes of fifty different states. This would provide different remedies for the violation of the same constitutional rights in different parts of the country and would certainly decree that Mrs. Jones' constitutional rights would not be fully protected.

III.

THE DECISION OF THE COLORADO SUPREME COURT IS ERRONEOUS SINCE IT MISAPPREHENDED THE FEDERAL LAW OF STANDING UNDER THE FEDERAL CIVIL RIGHTS ACT.

A. Ruby Jones has standing to sue independent of state law.

In affirming the judgment of the trial court, the Colorado Supreme Court held that in order for Ruby Jones to bring a §1983 action for the death of her son, she was forced to rely on the Colorado Wrongful Death Statute, *Colo. Rev. Stat. Ann.* §13-21-202. It held the result of this to be that:

> Colorado's wrongful death remedy would be engrafted into a §1983 action if brought in federal

> court. However, because the instant suit was brought in a state court, the trial court properly ruled that the two actions were merged so that the §1983 claim should be dismissed.
>
> Furthermore, because the allowable damages are such an integral part of the right to bring a wrongful death remedy, we believe the state's law of damages should also apply. [*Jones v. Hildebrant*, 550 P.2d 339, 344 (Colo., 1976), *cert. granted* January 17, 1977.]

In so ruling, the Colorado Supreme Court erred in several respects.

While it is true that state law may be used to determine standing, *Moore v. County of Alameda*, 411 U.S. 693, 702-703 (1973); *Mattis v. Schnarr*, 502 F.2d 588 (8th Cir., 1974); *Brazier v. Cherry*, 293 F.2d 401 (5th Cir., 1961), it is not true that a plaintiff does not have standing to sue absent a state statute. Rather, federal common law gives Ruby Jones standing to sue.

The Congressional intent in passing the Civil Rights Acts indicates that Mrs. Jones has standing to sue, for there can be no question that §1983 was meant to apply to death cases. President Grant's message to Congress referred specifically to the loss of life which prompted him to ask for federal legislation. *Cong. Globe*, 42d Cong., 1st Sess., p. 244. The floor debates on the bill frequently reflected this theme. For example, Senator Lowe of Kansas stated:

> While murder is stalking abroad in disguise, while whippings and lynchings and banishment have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper correction. [*Id.* at 374].

Similarly, Congressman Butler, in trying to convince his colleagues that municipalities should be liable under the Civil Rights Acts, stated:

> This then is what we offer to a man whose house has been burned, as a remedy; to the woman whose husband has been murdered, as a remedy; to the children whose father has been killed as a remedy. [Cong. Globe, 42d Cong., 1st Sess. at 807].

Given this background, it is not surprising that the courts have uniformly held that Congress intended the Civil Rights Acts to apply where the deprivation of constitutional right resulted in death. See, *e.g.*, *Brazier v. Cherry*, *supra*; *Hall v. Wooten*, 506 F.2d 564 (6th Cir., 1974). See also, *Scheuer v. Rhodes*, 416 U.S. 232 (1974). In *Brazier v. Cherry*, supra, the court held:

> [I]t defies history to conclude that Congress purposely meant to assure to the living freedom from such unconstitutional deprivations, but that, with like precision, it meant to withdraw the protection of civil rights statutes against the peril of death. The policy of the law and the legislative aim was certainly to protect the security of life and limb as well as property against these actions. Violent injury that would kill was not less prohibited than violence which would cripple. [*Id.* at 404].

The above analysis indicates that the instant case falls squarely within the purview of 42 U.S.C. §1983. Ruby Jones' son, Larry, a black 15-year-old boy, was shot and killed, without justification or excuse, by a uniformed police officer acting intentionally and under the color of state law. This is precisely the sort of outrage for which Congress sought to create a deterrent;

this is precisely the sort of wrong for which Congress provided a remedy.

Given the clear Congressional intent to apply §1983 actions to death cases, it is incumbent upon this Court to insure that the appropriate relief is available. *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964). As Mr. Justice Black, speaking for the Court in *Bell v. Hood*, 327 U.S. 678, 684 (1946) stated:

> [W]here federally protected rights have been involved, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to right the wrong done.[6]

Accord, Basista v. Weir, supra, at 87.

With this mandate in mind, it is not surprising that courts have in the past used federal common law for the purpose of standing in §1983 actions. For example, in *Scheuer v. Rhodes, supra,* this Court, without referring to state law, held that the plaintiffs had stated a cause of action for the death of their children.

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[6] This doctrine can be traced back at least as far as *Marbury v. Madison*, 5 U.S. (1 Cranch.) 160, 162-163 (1803), where the Court held:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.
>
> * * *
>
> The government of the United States has been emphatically termed a government of laws and not of men. It will certainly cease to deserve this high appellative, if the laws furnish no remedy for the violation of a vested right.

Similarly, in *Davis v. Johnson*, 138 F. Supp. 575 (N.D. Ill., 1955), a case decided prior to *Brazier, supra,* the Court merely construed the Civil Rights Acts so as to permit a suit by the administratrix of the decedent's estate. Most recently, in *Shaw v. Garrison, supra,* the Court of Appeals for the Fifth Circuit held that although the action would have died with the death of the plaintiff (after suit had been brought) under the Louisiana survivorship statute, the Court would not apply that law to a civil rights action.

Ruby Jones additionally has standing to bring this suit since when the defendant, Douglas Hildebrant, shot Larry Jones, *he deprived Mrs. Jones of her rights without due process of law.* The case law makes this argument clear. In *Mattis v. Schnarr, supra,* the Court held:

> We believe that "parenthood is a substantial interest of surpassing value and protected from deprivation without due process of law – a fundamental legal right." [*Id.* at 595, quoting from *White v. Minor*, 33 F. Supp. 1194 (D. Mass., 1971)].

The decisions of this Court are in accord with this proposition. In *Armstrong v. Manzo*, 380 U.S. 545 (1965), this Court held that Texas could not terminate a father's parental rights without granting him due process. Similarly, in *Stanley v. Illinois*, 405 U.S. 465 (1972), an Illinois law providing that children of an unwed mother became wards of the state was invalidated. In doing so, the Court noted:

> The Court has frequently emphasized the importance of the family. The right to conceive and raise one's children have been deemed "essential", Meyer v. Nebraska, 262 U.S. 390, 399 (1923), "basic civil right of man", Skinner v. Oklahoma,

> 316 U.S. 535, 541 (1942), and "[r]ights far more precious than property rights", May v. Anderson, 345 U.S. 528, 541 (1953). [*Id.* at 651].

The Court then went on to note that the "integrity of the family" has found protection in the due process and equal protection clause of the Fourteenth Amendment, as well as the Ninth Amendment. *Ibid.* Are the above abridgements of parents' rights worse than the execution of one's child without due process of law?

B. While state law may be used to obtain standing, state law of damages may not restrict the uniform federal measure of damages under the Civil Rights Acts.

While Ruby Jones has standing to bring the instant action without resort to state law, state law may also be utilized to fill in any gaps in the state law. The landmark case in this regard is *Brazier v. Cherry, supra,* in which the Court held:

> Thus §1983 declares a simple direct abbreviated test: What is needed in the particular case under scrutiny to make the civil rights statutes fully effective? The answer to that inquiry is then matched against (a) federal law and if it is found wanting the court must look to (b) state law currently in effect. To whatever extent (b) helps, it is automatically available, not because it is procedure rather than substance, but because Congress says so. [*Id.* at 409].

In *Brazier,* the Court noted that Georgia had both a wrongful death and a survivorship statute; consequently, the widow of the deceased had standing to sue. The *Brazier* doctrine has been followed consistently, both in

actions based on a state wrongful death statute. See, *e.g., Mattis v. Schnarr, supra; Love v. Davis,* 353 F. Supp. 582 (W.D. La., 1973); *Smith v. Wickline,* 396 F. Supp. 555 (W.D. Okla., 1975); *Galindo v. Brownell,* 255 F. Supp. 930 (S.D. Calif., 1966), and actions based on state survivorship statutes, *Moore v. County of Alameda, supra; Hall v. Wooten, supra.* See also, *Belcher v. Stengel,* 522 F.2d 438 (6th Cir., 1975), *petition for writ of certiorari dismissed,* 97 S.Ct. 514 (1977). As Colorado has both a wrongful death statute, *Colo. Rev. Stat. Ann.* §13-21-202 (1973), and a survivorship statute, *Colo. Rev. Stat. Ann.* §13-20-101 (1973), there can be no question that Ruby Jones had standing to sue for the death of her son.

State law may be used to establish standing, but it is a complete non sequitur to hold, as did the Colorado Supreme Court, that the wholly inadequate state law of damages in death cases must necessarily also apply. As the above-cited cases make clear, state law is to be used only to fill in gaps in the federal law. See, *e.g., Moore v. County of Alameda, supra; Brazier v. Cherry, supra; Shaw v. Garrison, supra.* While it can be argued that the Federal Civil Rights Acts seem to be deficient with respect to standing, there is not similar deficiency with respect to the federal law of damages. Rather, there is a specific statute, 42 U.S.C. §1988, which controls the measure of damages in §1983 actions, and a well-developed body of federal common law. *Basista v. Weir, supra.* Since there is no void in the federal law of damages, the inadequate state law may not be utilized.

The state law of damages is additionally unavailable since state law may only be used where it "is not inconsistent with the Constitution and laws of the United States." 42 U.S.C. §1988, *Shaw v. Garrison, supra; Pritchard v. Smith,* 298 F.2d 153 (8th Cir.,

1961). This Court has construed the above language to mean that "[B]oth federal and state rules on damages may be used, whichever better serves the policies of the statutes." *Sullivan v. Little Hunting Park, supra,* at 240. A comparison of the Colorado measure of damages and the federal measure of damages clearly indicates that the Colorado law is inconsistent with the federal law, and does not "serve the purposes" of the federal law.

Under Colorado law, the damages in the instant action are governed by the net pecuniary loss rule.[7] Accordingly, the loss to the parent is limited to the actual net pecuniary loss occasioned by the child's death, even if that loss is limited to the costs of burying the child. *Kogul v. Sonheim,* 150 Colo. 316, 372 P.2d 731 (1962); *Pierce v. Conners,* 20 Colo. 178, 37 P. 721 (1894). Even these pecuniary damages are limited by statute in the case of a non-dependent plaintiff (such as Mrs. Jones) to $45,000. *Colo. Rev. Stat. Ann.* §13-21-203 (1973). Moreover, under Colorado law, no exemplary damages may be awarded in death cases, no matter how brutal the killing. *Hayes v. Williams,* 17 Colo. 465, 30 P. 352 (1892).

The federal measure of damages is, however, much more expansive. It includes, of course, compensation for pecuniary loss, *Spence v. Staras,* 507 F.2d 554 (7th Cir., 1974), but goes far beyond that. Under federal law, in a §1983 action, the plaintiff may recover compensation for emotional and mental distress, *Donavan v. Reinbold,* 433 F.2d 738 (9th Cir., 1970);

[7] For a complete discussion and denunciation of this rule, see Note, *Blind Imitation of the Past: An Analysis of Pecuniary Damages in Wrongful Death Actions,* 49 Denver L.J. 99 (1972).

and loss of companionship and support. *Love v. Davis, supra.*[8]

Under the Civil Rights Acts, the loss of a civil right is itself compensable. Consequently, damages may be obtained without any showing of other loss. *Paton v. LaPrade,* 524 F.2d 862 (3d Cir., 1975); *Hostrop v. Board of Jr. College,* 523 F.2d 569 (7th Cir., 1975); *Rhoads v. Horvat,* 270 F. Supp. 307 (D. Colo., 1967). Moreover, these damages are substantial. As the court held in *Farber v. Rizzo,* 363 F. Supp. 386, 398 (E.D. Pa., 1973), "The value of such rights, while difficult of assessment, must be considered great."

Finally, the Civil Rights Acts were intended not only to provide compensation for the injured victims, but also were intended as a *deterrent* to unconstitutional activity. Congressman Beatty made this clear, stating:

> [If Congress] finds that a citizen's constitutional rights are in jeopardy from any cause, that they have been ruthlessly stricken down or wrongfully denied, and existing laws are inadequate for his relief, it is bound to make such appropriate further legislation as shall be sufficient for his *protection* and redress. [Emphasis added; *Cong. Globe,* 42d Cong., 1st Sess., p. 429].

According to the federal common law, where a deterrent effect is needed, exemplary damages are available. *Fisher v. Volz,* 496 F.2d 333 (3d Cir., 1974);

[8] In federal maritime wrongful death actions, this Court has held as a matter of federal common law that a plaintiff may recover for loss of "support, services, society, and funeral expenses." *Sea-Land Services, Inc. v. Gaudet,* 414 U.S. 573, 584 (1973). Plaintiff can see no reason why compensatory damages available in maritime death actions should not also be available in death cases filed under 42 U.S.C. §1983.

Lee v. Southern Home Sites Corp., 429 F.2d 290 (5th Cir., 1970). Thus, it has been uniformly held that exemplary damages are available in §1983 cases. *Basista v. Weir*, supra; Annot. 14 A.L.R. Fed. 608 (1973).

In sum, the federal measure of damages is far more expansive than the Colorado measure of damages. Since the Colorado rule is inconsistent with the federal rule and does not properly serve the purposes of the Act, the insufficient Colorado rule of damages should not be adopted, 42 U.S.C. §1988; *Shaw v. Garrison, supra.* See also, United States Constitution, Article 6, Section 2.

CONCLUSION

For the foregoing reasons, the plaintiff hereby asks this Court to issue its Order reversing the decision of the Colorado Supreme Court and order a new trial on the issue of damages on the §1983 claim.

Respectfully submitted,

WALTER L. GERASH
DAVID K. REES
Suite 2317, 1700 Broadway
Denver, CO 80290

Counsel for Petitioner